

**THE FOURTEENTH AMENDMENT'S PROTECTION SCOPE OVER SEXUAL
ORIENTATION: A COMPREHENSIVE LEGAL ANALYSIS**

By Mercedes Bugallo

Bachelor of Philosophy, University of Pittsburgh, 2012

Submitted to the Undergraduate Faculty of
The University of Pittsburgh's Political Science Department in
partial fulfillment of the requirements for the degree of
Bachelor of Philosophy

University of Pittsburgh

2012

UNIVERSITY OF PITTSBURGH

University Honors College

This thesis was presented

by

Mercedes Bugallo

It was defended on

April 18th, 2012

and approved by

Michael J. Kessler, Professor, Philosophy Department, University of Pittsburgh

David J. DeFazio, Professor, Graduate School of Public and International Affairs, University
of Pittsburgh

Jessie A. Allen, Assistant Professor of Law, School of Law, University of Pittsburgh

Thesis Director: Lisa S. Nelson, Associate Professor, Graduate School of Public and
International Affairs, University of Pittsburgh

Copyright © by Mercedes Bugallo
2012

**THE FOURTEENTH AMENDMENT'S PROTECTION SCOPE OVER SEXUAL
ORIENTATION: A COMPREHENSIVE LEGAL ANALYSIS**

By Mercedes Bugallo

Bachelor of Philosophy 2012

This thesis provides an in-depth legal analysis of the protection status granted to minority groups by the Supreme Court under the Fourteenth Amendment. It sets forth a thorough definition of what a suspect class is and an explanation of its requirements, with the final aim of analyzing sexual orientation within the boundaries of such definition. There are four main points to consider when identifying a suspect class: a history of purposeful discrimination, political powerlessness, an immutable and uncontrollable trait, and incorrect stereotypes. If all the indicia of suspectness are met then the group is considered a suspect class and if only some of the criteria are met then it is considered a Quasi-suspect class. This thesis will prove that sexual orientation is at least a Quasi-suspect class by fulfilling most of the requirements in an above-satisfactory fashion, although the argument could perfectly be made for full-suspectness status if the Court were to find them all sufficient. It also comprehensively compares U.S. court cases throughout, and finally presents a side-by-side review of U.S. Supreme Court's decisions on gender and sexual orientation.

TABLE OF CONTENTS

PREFACE	iv
I. INTRODUCTION	1
II. METHODS OF REVIEW UNDER EQUAL PROTECTION LAW	3
A. RATIONAL BASIS TEST	3
B. HEIGHTENED SCRUTINY	4
III. SUSPECT CLASSIFICATION	7
IV. THE PARTICULAR CASE FOR HOMOSEXUALITY	13
A. IMMUTABILITY AND SEXUAL ORIENTATION	13
B. A HISTORY OF PURPOSEFUL DISCRIMINATION	23
C. INCORRECT STEREOTYPES	35
D. POLITICAL REPRESENTATION OF HOMOSEXUALS	40
V. STARE DECISIS	47
VI. CONCLUSION	50
BIBLIOGRAPHY	53

I. INTRODUCTION

The plight of homosexuals and their struggle for equality and protection in the United States is one of the most formidable and intriguing cultural, legal and social issues to strike this country in the past century. There is a stark contrast between the socially liberal America well-known as the “the melting pot” of cultures and home to acceptance to diversity, as opposed to narrow-minded political system that seems to deprive groups of citizens of equal rights. Why is it then that in the past recent years the Supreme Court has been unusually adamant to provide heightened protection to such groups as homosexuals? Their reluctant behavior, whichever the cause, does not only promote the stereotype that homosexuals are not worth the protection against discrimination on a legal basis but they also don’t deserve it from a moral stance on human rights.

Long considered by the masses as deviants or undesirables, homosexuals are finally able to stand up for themselves and fight the system that once deemed them mentally ill¹ for simply choosing a love and/or life partner that shared the same gender at birth.

1 Before 1970, the American Psychological Association took the stance that homosexuality was considered a psychological disease. This was rectified in 1973. [Adopted by the American Psychological Association Council of Representatives on January 24-26, 1975]

a). The American Psychological Association supports the action taken on December 15, 1973, by the American Psychiatric Association, removing homosexuality from that Association's official list of mental disorders. The American Psychological Association therefore adopts the following resolution: Homosexuality per se implies no impairment in judgment, stability, reliability, or general social and vocational capabilities; Further, the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations.

b). Regarding discrimination against homosexuals, the American Psychological Association adopts the following resolution concerning their civil and legal rights: The American Psychological Association deplors all public and private discrimination in such areas as employment, housing, public accommodation, and licensing against those who engage in or have engaged in homosexual activities and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon these individuals greater than that imposed on any other persons. Further, the

Nowadays, according to the American Heritage Medical Dictionary, sexual orientation is defined as “The direction of one's sexual interest toward members of the same, opposite, or both sexes, especially a direction seen to be dictated by physiologic rather than sociologic forces.”² Currently, the United States has no federal legal protection for citizens that identify with such a medical term. At a state level the government has the freedom to establish and enforce laws against discrimination on the basis of sexual orientation, but as long as there is no overreaching national law then those state decisions are vulnerable to countless appeals. The ongoing battle between state and federal jurisdiction and the cycle of rulings on this important issue will not be resolved as long as both levels of the law are not in agreement.

Sexual orientation protection has been a particularly controversial issue in America for the past half century and it has awakened a number of theories and arguments from both supporters and oppositions. As society becomes more aware of the injustices that this group has endured through the years, a revolutionizing movement has grown and advanced to acquire legal protection for homosexuals. There are many ways this kind of protection could be adopted, but the most clear and permanent option seems to be changing the manner in which the Supreme Court analyzes their level of protection under the fifth and fourteenth amendment. By changing the Court's precedent, homosexuals can claim equal protection under the Equal Protection and

American Psychological Association supports and urges the enactment of civil rights legislation at the local, and state and federal level that would offer citizens who engage in acts of homosexuality the same protections now guaranteed to others on the basis of race, creed, color, etc. Further, the American Psychological Association supports and urges the repeal of all discriminatory legislation singling out homosexual acts by consenting adults in private (Conger, 1975, p. 633).
Reference: Conger, J.J. (1975) Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the Annual meeting of the Council of Representatives. American Psychologist, 30, 620-651.
2 The American Heritage® Medical Dictionary Copyright © 2007, 2004 by Houghton Mifflin Company.

Due Process clause. This would provide them suspect classification under the law, but the process to achieve such status is quite particular.

This article sets forth the analysis required by the courts to deem homosexuals a suspect class protected under the constitution, and will hopefully serve to enlighten the legal community of the dire need for constitutional reform on the issue of sexual orientation protection from discrimination.

II. METHODS OF REVIEW UNDER EQUAL PROTECTION LAW

A. RATIONAL-BASIS TEST

The Supreme Court usually applies a minimal method of scrutiny when there's a challenge under the Fourteenth or Fifth Amendment of the constitution of a legislative classification. This minimally scrutinizing method is called a "rational basis test" which examines whether the legislature had a justifiable and rational basis related to a legitimate state end for enacting a legislation³, and that "statutory classification will be set aside only if no grounds can be conceived to justify them".⁴ Under this review, whoever challenges the law has the impossible burden to prove that the state has absolutely no rational interest in any possible

³ United States v. Carolene Products Co., 304 U.S. 144 (1938)

⁴ McDonald v. Board of Elections, 394 U.S. 802, 809 (1969)

good to maintain the law⁵. The challenged law is virtually always upheld, and the attempts to change the long-standing legal system unsurprisingly fail.⁶

B. HEIGHTENED SCRUTINY

There are certain cases where the rational review test is not enough to consider the complexities of a specific case. These instances are coupled under the “heightened scrutiny” consideration, and are those which require a more complex and thorough examination and analysis of the law in order to reach a just and unbiased decision. These are cases that either discuss “fundamental rights”⁷ or seemingly and unjustly infringe on the lives of a “suspect” or “quasi-suspect”⁸ group of individuals. Under this category of heightened scrutiny, we find strict and intermediate levels of protection:

⁵ 57 S. Cal. L. rev. 797 1983-1984, at 808

⁶ L. Tribe, AMERICAN CONSTITUTIONAL LAW (1979) § 16-2, at 994-96. Also, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (Marshall J., Dissenting, said that when the rational-basis test is applied there is “little doubt about the outcome; the challenged legislation is always upheld”). There are a few exceptions to this pattern in history, such as Reed v. Reed, 404 U.S. 71, 83 (1971), where the Court invalidated laws based on the rational basis test in the early 1970’s. This has been explained by the Court’s misunderstanding of rationality with reasonableness, see Bice, Rationality Analysis in Constitutional Law, 65 MINN. REV. 1, 30 (1980). Decisions such as this and the general discontent with them are considered the “forbearers” of the intermediate scrutiny tests (Supra note 5, at 811)

⁷ Plyler v. Doe, 457 U.S. 202, 216-17 & n.15 (1982): strict scrutiny for those laws that intrude or meddle with fundamental rights. I.e.: See Shapiro v. Thompson, 394 U.S. 618, 630 (1969) for the fundamental right of interstate travel.

⁸ Quasi-suspect groups are those who do not fulfill all the requirements for a suspect classification, but are still protected under an intermediate scrutiny level. This term has never been defined by the Supreme court themselves, although it was used in the dissent of Plyler v. Doe, 457 U.S. 202, 204 (1982) by Chief Justice Burger (Burger, C.J., Dissenting), and it as also been used by some lower courts, I.e.: De Santis v. Pacific Tel & Tel. Co., 608 F.2d 327 (9th Circuit 1979).

1. *Strict Scrutiny*

Strict scrutiny is the highest level of protection that Court can give a legislative classification. It's such in which any statute that employs the classification in question must be necessary to achieve a permissible and compelling governmental interest, through the least restrictive method available, and it must be narrowly tailored.⁹ . Usually, the standard is so high that few legislation survive the scrutiny. The Court deems national origin, race¹⁰, religion¹¹, and, in some circumstances, alienage¹² a suspect class.

2. *Intermediate Scrutiny*

The first case about a request-to-be suspect group to reach the Supreme Court doubting the constitutionality of a law under the Equal Protection Clause was *Reed v. Reed* in 1971. In this case, Sally Reed sued §§ 15-312 and 15-314 of the Idaho Code favoring males as administrators in an estate case after someone's death. (she was denied priority over her husband after her son's death). She challenged the law under the Fourteenth Amendment, claiming it

⁹ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); *Loving v. Virginia*, 388 U.S. 1, 10 (1967). I.e.: See, *Sherbert v. Verner*, 374 U.S. 398 (1963) for the Sherbert Test for a compelling governmental interest in Free Exercise of religion cases.

¹⁰ *Loving v. Virginia*, 388 U.S. 1, 10 (1967) established the rule that any legislation based on racial classification will be subject to the highest standard of review. Also See, *Yick Wo v. Hopkins* 118 U.S. 356 (1886).

¹¹ See *Sherbert v. Verner*, 374 U.S. 398 (1963) . I.e.: *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Employment Division v. Smith*, 494 U.S. 872 (1990)

¹² State laws that discriminate against aliens who are legally in the country are "inherently suspect", *Graham v. Richardson*, 403 U.S. 365, 372 (1971), unless the classification falls within a recognized "political community" exception, in which case only rational basis scrutiny will be applied.

infringed on her right to equal protection under the law. In *Reed*, the Court concluded “By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violated the Equal Protection Clause.”¹³ Under *Reed*, all people similarly situated should be given the same treatment and consideration, and gender could not be used to discriminate one group over another.

In *Craig v. Boren* in 1976, the Court took gender to the next step by setting it under intermediate scrutiny, a new consideration from the rational basis used in *Reed*. In *Craig v. Boren*, Curtis Craig challenged the Oklahoma law that applied preference on women to buy alcohol at 18, when men couldn't until 21 years of age. The Court decided to apply a new level of scrutiny, an intermediate one, in which “To be valid the unequal treatment must serve important government objectives and must be substantially related to the achievement of those objectives.”¹⁴ Gender was not held as strict as race for discrimination, but it still overpassed the rational basis test.

An intermediate level of scrutiny is also applied to those minority groups that fulfill some, but not all, the requirements to be considered a suspect class. This intermediate level is applied to what we consider quasi-suspect groups. It's such in which any statute that employs the classification in question must achieve an important governmental interest and it must do so in a substantially related method to such interest.¹⁵ The only classifications to which the Court has

¹³ Lee Epstein, *Constitutional Law For a Changing America*, 6th ed. (Washington, D.C.: CQ Press, 2007), p. 665

¹⁴ Lee Epstein, *Constitutional Law For a Changing America*, 6th ed. (Washington, D.C.: CQ Press, 2007), p. 620

¹⁵ Intermediate scrutiny classification definition: Cornell University Legal Information Institute. Retrieved from: http://www.law.cornell.edu/wex/intermediate_scrutiny

applied an intermediate level of scrutiny so far have been gender¹⁶, illegitimacy¹⁷, and the illegal alien status of minors¹⁸.

III. SUSPECT CLASSIFICATION

A suspect class is a group of individuals who undergo special considerations under the law to protect them from the political and social majority for their unique background in a purposeful, unjustified discrimination past and a history of political powerlessness.¹⁹ Because of this lack of political power, the minority groups that are subject to a suspect classification are more vulnerable to discrimination under the law than would a majority or politically represented group if it wasn't for the heightened attentiveness the Court gives their legislation. Thus, the

¹⁶ See *Craig v. Boren*, 429 U.S. 190 (1976) and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) for "important governmental interest" as a required component in statutes using gender classification. For sex classification in education and changes based on the sex of a juror, See *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994) and *United States v. Virginia*, 518 U.S. 515 (1996). Also, See, *Cleburne v. Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) for gender-based classifications under heightened scrutiny.

¹⁷ *Reed v. Campbell*, 476 U.S. 852 (1986) "It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society. The Court recognized in *Weber [v. Aetna Casualty & Surety Co.]*, 406 U. S. 164 (1972)] that visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons". *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) claimed that the illegitimacy classification must be substantially related to the important governmental interest; and *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) giving heightened scrutiny to legislation affecting illegitimate children.

¹⁸ *Plyler v. Doe*, 457 U.S. 202 (1982) claimed that those laws that burden children based on their illegal status must be subjected to an intermediate scrutiny and provide proof of an important state interest. This applies to states and their deprivation of public education from children, but it does not consider education a fundamental right at a federal level (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28-39 (1973)).

¹⁹ See *San Antonio*, 411 U.S. 1

court takes a more meticulous approach to analyzing such statutes dealing with suspect classifications in order to avoid simply discriminating against an unprotected minority.²⁰

The Supreme Court has never established an exhaustive list of suspect groups, since “It cannot be gainsaid that there remain... classes, not now classified as “suspect”, that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members.”²¹

Making an exhaustive list of classifications would eradicate the possibility of later on finding other minorities that might be legally entitled to suspect protection. This is why the Court set instead criteria of 4 requirements that any minority group must fulfill at any given time in order to be considered a suspect class.

These criteria must be completely matched if the group should be considered for strict scrutiny (as race or religion) and only some of them have to be fulfilled in order to be considered a quasi-suspect group (as gender). The requirements are: a history of purposeful discrimination, an immutable trait, political powerlessness, and the statute must be deemed grossly unfair from a reasonable standpoint because of an incorrect stereotyped characteristic. This paper will aim to prove that homosexuality easily fits the characteristics for a quasi-suspect protection, but it is the belief of the author that a case can be perfectly made for full strict scrutiny of the minority group.²²

²⁰ Carolene, 304 U.S. at 152 n.4

²¹ Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (Marshall J., dissenting)

²² In the recent past, the Supreme Court has been more adamant to allow strict scrutiny status than intermediate scrutiny to those groups that defy constitutional statutes. This conservative standpoint that the chief justices have taken makes it that much more complicated for minorities like homosexuals to fight for strict scrutiny, leaving the fate of this analysis on immutability, which seems to be the most debatable and fickle aspect of this discourse. Given the highly unclear and obscure outcome of the judge’s recognition of homosexual immutability, the aim of this paper is to provide sufficient evidence of scientific research for their approval whilst still requiring a minimum of quasi-suspect status.

1. Immutable Trait²³ That The Members Of The Group Cannot Earn Or Choose To Opt Out Of

The Court has specified in previous cases that factors that are beyond the control of the individual and are permanent or invariable within group membership can and should be taken into consideration when deciding cases in favor or against the suspectness of a group²⁴. These considerations are crucial to maintaining “fairness and adequacy of representation”²⁵ within the judicial system. Individuals need to show adequacy to the level of relationship they maintain with the group they claim to be part of. And fairness with the extent of their responsibilities and wrongdoings, and the degree to which both relate to their legal burdens.

Immutability and lack of control have been taken into consideration for quasi-suspect groups such as gender and child alienage. For example, the Court stated in *Frontiero v. Richardson* that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”²⁶ The court also claimed it was unjust to punish an illegitimate child based on the illegitimacy because he or she was not responsible for it (it was out of their control).²⁷

²³ For reference on all the following requirements/criteria of suspectness, See *Id.* note 5, at 812-915

²⁴ *Parham v. Hughes*, 441 U.S. 347, 351 (1979); *Plyler v. Doe*, 457 U.S. 202, 204 (1982); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

²⁵ *Id.* note 5, at 813

²⁶ Lee Epstein, *Constitutional Law For a Changing America*, 6th ed. (Washington, D.C.: CQ Press, 2007), p. 667

²⁷ *Parham v. Hughes*, 441 U.S. 347, 353 (1979); See *Mathews v. Lucas*, 427 U. S. 495, 427 U. S. 505 (1976): “is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent.”

Immutability is neither sufficient nor necessary to claim a group suspect or quasi-suspect. The Court determines which groups pass the relevant threshold on an individual basis for every single case they review. Furthermore, groups such as gender or race are not as unchangeable as they once used to be, since nowadays they can be altered even if at a great expense to the individual.

2. Incorrect Stereotypes

This criterion helps the Court stop discrimination or injustices on the basis of a prejudicial characteristic of a group that is not true or has stopped being true. The aim is to prevent the unfair disadvantage of a group based on mistaken stereotypes.²⁸

The Court believes individuals should not be simple categorized on the basis of prejudice for group membership, but also considered by their abilities as individuals even if stereotypes may indicate otherwise. For example, in *Frontiero* the court showed their opposition to the practice of legally generalizing a social opinion, stating “Statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members”.²⁹

This requirement is also neither conclusive nor necessary. It only provides a “general guidance”³⁰, given that all legislations utilize stereotypes in one form or other in their decisions.

²⁸I.e.: See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

²⁹ Lee Epstein, *Constitutional Law For a Changing America*, 6th ed. (Washington, D.C.: CQ Press, 2007), p. 667, quoting *Frontiero v. Richardson*, 411 U.S. 677 (1973).

³⁰ *Id.* note 5, at 814

3. *History Of Purposeful And Unequal Treatment*

History of discrimination tries to prove that the group in question has been subjected to a past of prejudicial and unequal treatment in society (either socially, politically, judicially, or all of the above together). In gender-based classification cases like *Frontier v. Richardson*, the court considered the long history of sex-discrimination experienced in the United States to be significant evidence for an “increased sensitivity to sex-based classifications”³¹.

But this criterion has also been used to refute certain claims of suspect classification in groups like the elderly. The Court denied the elderly to be a suspect group, arguing, “While the treatment of the aged in this Nation has not been wholly free of discrimination, [the elderly]... have not experienced a ‘history of purposeful unequal treatment’”³². Thus, while the criterion can be used to claim suspectness, the lack of thereof can also be a factor in their dismissal. There’s a thin line between a history of discrimination that’s unfair and one that is justified by the legal system, such as unequal treatment of the basis of criminal behavior³³ or one that isn’t significant enough to be considered purposeful, as they may be considered simple preferences or principled disapproval.

³¹ See *Frontiero v. Richardson*, 411 U.S. 677 (1973)

³² 64 Temp. L. R. 947 1991, quoting the majority decision in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976)

³³ John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard Paperbacks) (London: Harvard University Press, 1980), at 260 n.64.

4. *Political Powerlessness*

The lack of a political influence is one of the most important factors when deciding which groups should be afforded special protections under the Fourteenth Amendment. “Discrete and insular minorities”³⁴ is how the Court addressed those groups of individuals which lack sufficient political influence in order to make a significant difference in the decision-making process. This doesn’t necessarily mean that the group has to be numerically a minority. For example, women constitute a numerical majority of the population but are still considered a political minority in the United States because of their low political impact and political representation as a whole.³⁵ The group has to have been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”³⁶. The Court seeks to protect these minorities with heightened scrutiny in legislation because the assumption concludes they would be defenseless to the oppressive majority through the other branches of government. Groups that face political powerlessness are justified in requiring special protection, and those whose are not politically powerless can reasonably be restricted by this criterion.

³⁴ In *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the Court addressed aliens as a prime example of a “discrete and insular minority”.

³⁵ Janine A. Parry, “Women’s policy agencies, the women’s movement and representation in the USA” in Joni Lovenduski, ed., *State Feminism and Political Representation* (New York: Cambridge University Press, 2006), p. 239-259

³⁶ *San Antonio Indep. School Dist. V. Rodriguez*, 411 U.S. 1, 28 (1973)

IV. THE PARTICULAR CASE FOR HOMOSEXUALITY

(CRITERIA APPLIED)

A. IMMUTABILITY AND SEXUAL ORIENTATION

As we previously pointed out, sexual orientation is one of the most polemical and controversial aspects of this research. The question as to whether homosexuals are born gay or their sexual orientation is a product of their environment is one that has been intensely debated by both proponents and opposing scholars. It all boils down to deciding whether it's a permanent characteristic in the individual that he or she has absolutely no control over, or it's a product of our upbringing and can be "cured" or changed.

Even if it's the decision of the court to consider homosexuality as part of the former category, it still is bound to prove a fallacy in at least another category. Certain suspect groups such as gender and race are not completely immutable, but it would be preposterous to claim they do not deserve constitutional protection as minorities. Even if a black man can "pass" for white because of his lighter pigmentation and a man can get a sex-change operation to become biologically a woman³⁷, it does not nullify their suspectness in the eyes of the law. Subsequently, even if homosexuality is not considered an immutable trait, it should be proven that it does not qualify in other criteria to be suspect. As explained earlier in this paper, the immutability of

³⁷ For the purpose of this paper, I address a biological woman as such who is identified as female through female genitalia and a legal female status (which can be switched from male to female under the law after a sex operation). I do require females to be able to reproduce or have functioning reproduction systems in order to be considered a "woman", as nobody else should, for women who are born female and are not able to reproduce offspring are still viewed as female under the law.

characteristics is not necessary not sufficient for suspectness. This does not imply that such suspect groups should from now on be no longer considered suspect, but that instead homosexuals be considered suspect as well. If the Court dismisses their suspect classification merely on the basis of immutability, then it would have to explain to society why the judicial system seems to be biased for certain groups and unequally give lesser consideration to others under the same logical and procedural analysis.

The nature versus nurture dilemma is one riddled with scientific research, and it's the aim of this section to provide sufficient evidence as to the immutable and innate aspects of homosexuality, thus fulfilling the criteria herein discussed.

1. *LeVay And Differences In The Hypothalamus*

Simon LeVay conducted his research in the Salk Institute for Biological Studies in San Diego, where he reported “subtle but significant differences” in between the composition of the hypothalamus of homosexual and heterosexual men³⁸ close in age. LeVay dissected the brains of forty-one subjects, nineteen homosexual men, six heterosexual women, and sixteen heterosexual men, and compared a particular cluster of cells called the INAH-3 on the anterior hypothalamus³⁹, which is the section of the brain associated with a heterosexual male’s sexual behavior⁴⁰. He discovered that, alike the comparison between men and women’s INAH-3⁴¹, all

³⁸ 14 Regent U. L. Rev. 383, 515 (2001-2002)

³⁹ Id. Note 38

⁴⁰ LeVay, “A Difference in Hypothalamic Structure between Heterosexual and Homosexual men.”, *Science*, New Series, Vol. 253, No. 5023 (Aug. 30, 1991), pp. 1036. Citing A. A. Perachio, L. D. Marr, M. Alexander, *Brain Res.* 177, 127 (1979); Y. Oomura, H. Yoshimatsu, S. Aou, *ibid.* 266, 340 (1983).

homosexual men also showed a much smaller level of these clusters of cells than any of the heterosexuals men did.

While the levels of INAH 1, 2, and 4, showed no difference, the levels of INAH-3 on heterosexual males were more than double that of homosexual males or females⁴². As LeVay himself puts it, “This finding indicates that INAH is dimorphic with sexual orientation, at least in men, and suggests that sexual orientation has a biological substrate.”⁴³

The theory LeVay concluded was that all individuals who were attracted to males had a smaller cluster of INAH-3 in their hypothalamus than did those individuals attracted to women. Biologically, then, homosexual men who are sexually oriented towards other men show a particular scientific difference in their anterior hypothalamus than heterosexual ones, thus proving a characteristic of sexual orientation that is beyond the control of the individual, and so far as we’re aware, immutable.

Even considering that only some of the heterosexual men but all of the homosexual ones died of AIDS, the research found no correlation between their cause of death and the results in the study:

⁴¹ William Byne, *Science and Belief: Psychobiological Research on Sexual Orientation*; 28 J. HOMOSEXUALITY 303, 327 (1995)

⁴² *Supra* note 40, at 1035 (“One-way analysis of variance (ANOVA) was used to look for significant differences between subject groups (Fig. 2). No differences were found for INAH 1, 2, or 4. [...] INAH 3 did exhibit dimorphism. One-way ANOVA showed that the three sample groups (from women, heterosexual men, and homosexual men) were unlikely to have come from the same population ($P = 0.0014$). Consistent with the hypothesis outlined above, the volume of this nucleus was more than twice as large in the heterosexual men ($0.12 \pm 0.01 \text{ mm}^3$, mean \pm SEM) as in the homosexual men ($0.051 \pm 0.01 \text{ mm}^3$). Because of uncertainty about the nature of the underlying distribution, the significance of this difference was evaluated by a Monte Carlo procedure (11); this showed the difference to be highly significant ($P = 0.001$). The difference was still significant when the homosexual men were compared with only the six heterosexual men who died of complications of AIDS ($P = 0.028$). There was a similar difference between the heterosexual men and the women (mean $0.056 \pm 0.02 \text{ mm}^3$; $P = 0.019$), replicating the observations in (6).”)

⁴³LeVay, *supra*

“There was no significant difference in the volume of INAH 3 between the heterosexual men who died of AIDS and those who died of other causes or between the homosexual men and the women. These data support the hypothesis that INAH 3 is dimorphic not with sex but with sexual orientation, at least in men.”⁴⁴

2. Twin Studies And Concordant Genetic Makeup

Before we dive head-first into the studies about twins, it would be worthy to note the difference between identical and fraternal twins that is relevant to these studies. Identical twins share the exact same (100%) genetic material. They are called monozygotic twins because they “develop from a single fertilized egg”⁴⁵, which later divides and creates two separate individuals with identical genetic makeup. Fraternal twins, on the other hand, are developed from two separate eggs, which is why they’re called dizygotic twins. Their genetic material is just as similar as would those of a brother and sister be, since they are basically only siblings that share their mother’s womb for development of the fetuses simultaneously.

This would mean that genetic characteristics are more prone to be observed shared by monozygotic twins than dizygotic twins given their identical genetic material.⁴⁶

⁴⁴ LeVay, *supra*

⁴⁵ Francis Mark Mondimore, *A Natural History of Homosexuality* (Baltimore: The Johns Hopkins University Press, 1996) p. 137

⁴⁶ Mondimore, *supra* at 138

2.1. Kallmann's Early Findings

The first twin study was done by Dr. Frank Kallmann and was published in the *British Journal of Nervous and Mental Disease* in 1952. This study was conducted as a response to a previous study on homosexuality, by disproving the previous belief that gay men had a defective Y chromosome in their genes and so have a larger number of sisters than brothers.⁴⁷ Kallmann surveyed eighty-five homosexual men (of which sixty-one twins were also surveyed for cross-comparison), and discovered that while only 11.5 percent of fraternal twins had a concordance of homosexual identity, identical twins shared a shocking almost 100% of concordance rate with each other. This highly controversial number “weakens the significance of explanations which over-stress... factors such as parental incompetence in the etiology of adult homosexuality.”⁴⁸

There were a few problems with Kallmann's study that lost credibility for his research. He selected the subjects from mental institutions, which is not a very reliable source for unbiased and untampered research, and he did not actually corroborate which sets of twins were monozygotic and which were dizygotic⁴⁹. Scholars quickly dismissed his research, and it wasn't until the 1990's that another large-scale twin study took place: the Bailey and Pillard's study.

⁴⁷Mondimore, supra at 138 (“The theory was that most males with a defective Y chromosome should die in utero.”)

⁴⁸ Mondimore, supra at 138 Quoting Kallman, “Comparative Twin Study” at p. 297.

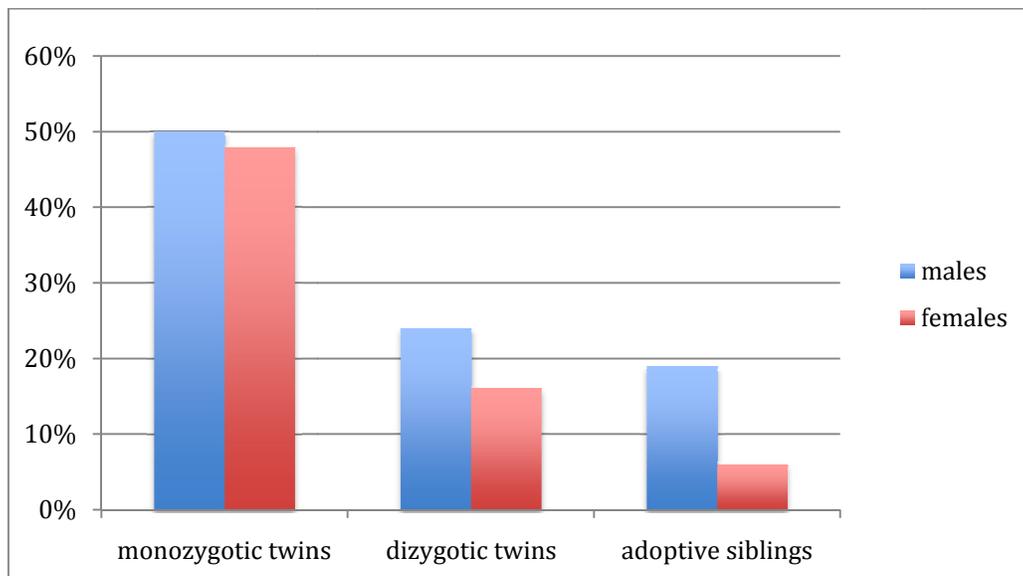
⁴⁹Mondimore, supra at 138.

2.2. Bailey And Pillard's Conclusive Research On Twins

Michael Bailey of Northwestern University and Richard Pillar of the Boston School of Medicine were the next scholars to study the concordance of genetic material in twins. In 1991, they conducted a research with more than one hundred pair of male twins, and in 1993 a second study was released involving female twins. The researchers sought homosexual males and females who either had an identical twin, a fraternal twin, or an adoptive sibling, and later compared the results from each group.

As expected, there was a higher correlation between identical twins than with fraternal twins, and they both had a higher correlation than adoptive siblings (who share absolutely no genetic material, and thus should have little to no correlation). Identical male twins had a concordance of 50% (which means that half of all monozygotic homosexual twin males have a homosexual brother), and female identical twins had a concordance of 48%. Fraternal twins, on the other hand, had a concordance of 24% in males and 16% in females. Lastly, adoptive siblings had the smaller concordance: adoptive brothers had a concordance of 19% and adoptive sisters of merely 6%.

The following graph depicts the findings:



As we can clearly observe, the concordance of homosexuality is on a clear downward slope from closest genetic makeup being the highest correlation to complete lack of genetic resemblance being the lowest. This definitively proves what Kallmann tried to show before but without much avail: that homosexuality is part, in one way or another, of our genetic makeup and thus we are predisposed from birth to our sexual orientation. This would seem to put an end to the dilemma of immutability, or at least it would absolutely take away any doubts about the lack of control homosexuals have on their predisposed sexual orientation.

There has been criticism on the results of the test, although not very significant. Some believe that it is strange that the levels between male dizygotic twins and adoptive brothers are rather similar⁵⁰. After all, if the correlation is valid then one would expect two individuals who share no genetic material at all to have a much lesser concordance of homosexuality than those

⁵⁰ Mondimore, supra At p. 140

individuals who were genetically related as siblings. But this is not a big concern in the study as a whole. The researchers believe that the slightly high concordance numbers between adoptive brothers is due to the fact that homosexuals who had non-gay adoptive brothers were much more reluctant to let them be interviewed than those who didn't⁵¹. If most of the adoptive brothers data was collected by those who were more willing and prone to let their brothers be interviewed, and such volunteers were observed to be more often than not willing when their brothers were also gay, then it is clear how the result could be, even if slightly, skewed towards a higher concordance of homosexual characteristics in this group.

A perfect example of the downward slope can be seen on the female study, and we can assume such as confidently that the same strong correlation is happening in males. Moreover, plenty of other studies have been made on twins to corroborate these findings, all successful and more specific in their procedures to avoid any mistakes or biases made before, and with the same results determining sexual orientation being “substantially influenced by hereditary factors in both males and females.”⁵²

3. The X-Chromosome Study

What seems to be one of the most scientifically sound and empirically proven research on homosexual genetics was conducted in 1993 by Dean H. Hamer and a group of geneticists at the

⁵¹ Mondimore, supra at 140

⁵² Mondimore, supra At p.141 Quoting for example J. Michael Bailey and Deana S. Benishay, “Familial Aggregation of Female Sexual Orientation”, *American Journal of Psychiatry* 150 (1993): 272-77; and Frederick Whitman, Milton Diamond, and James Martin, “Homosexual Orientation in Twins: A report on Sixty-One Pairs and Three Triplet Sets”, *Archives of sexual Behavior* 22, no. 3 (1993): 187-206. See also Constance Holden, ed., “Random Samples”, *Science* 268 (June 16, 1995): 1571.

National Institutes of Health. This research was published under the name “A Linkage between DNA Markers on the X Chromosome and Male Sexual Orientation” and it set out to finally determine once and for all if there was strict relationship between a subject’s genetic composition and their sexual orientation. In laymen’s terms, their goal was to prove that homosexuality is genetically caused, and thus as immutable and out of the subject’s control as would be their race or gender.

Hamer interviewed over one hundred families and asked the homosexual members of such families to identify themselves and their family members as either homosexual or heterosexual based on the Kinsley scale⁵³. After they all completed the self-assessments and their family assessments were verified⁵⁴, Hamer and his team noticed a pattern between the genealogy of the families and the sexual orientation of the members. Out of the 76 homosexual subjects, the highest rate of sexual orientation concordance was with their brothers, whom shared a 13.5% chance of also being gay⁵⁵. The next closest group of concordance were maternal uncles and maternal cousins, who shared an astonishing ~7.5% chance of also being a homosexual⁵⁶. There were no significant female homosexual concordances in any members, or concordance with their fathers. This unmistakable, specific, and obvious pattern was enough to spark curiosity in Hamer’s team.

Given that the highest concordance rates were found through either brothers or family members on the maternal side, the team hypothesized that whatever genetic concordance of

⁵³ Dean H. Hamer, et al., “A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation” *Science, New Series*, Vol. 261, No. 5119 (Jul. 16, 1993), p. 321 (“Sexual orientation was assessed by the Kinsey scales, which range from 0 for exclusive heterosexuality to 6 for exclusive homosexuality (13). Subjects rated them-selves on four aspects of their sexuality: self-identification, attraction, fantasy, and behavior”)

⁵⁴ Hamer, *supra* at 322 (“The reliability of the probands' assessment of their family members' sexual orientation was estimated by conducting interviews with 99 relatives of the index subjects.”)

⁵⁵ Hamer, *supra* at 322

⁵⁶ Hamer, *supra* at 322

sexual orientation had to come from the subject's maternal genetic line. Thus, those families with homosexual brothers should show a higher concordance rate with their maternal uncles and cousins. The following study was conducted with 38 families that had a set of homosexual brothers and no father-to-son homosexual match⁵⁷. The new sub-group of subjects and their families were then interviewed, and as expected they yielded even higher percentages. The study showed a 10.3% of concordance with their maternal uncles (from the original 7.3%) and 12.9% (from 7.7%) with their maternal cousins⁵⁸.

This could not be explained by environmental factors, given that the family members were raised in different households and even in different generations. Thus, the research team now had a clear understanding that there was indeed a specific genetic component of homosexuality, and since it was through the maternal line then it most likely was rooted in at least a section of the X-chromosome (the chromosome we get from our mothers). As Hamer explained "Since males receive their single X chromosome from their mothers, any trait that is influenced by an X-linked gene will be preferentially passed through the mother's side of the family."⁵⁹

A linkage test for the X chromosome of the subjects was a foolproof study to rule out any other possible causes of the pattern. The results were translucent and definite. Out of the 40 sub-pairs of families selected (the original 38 and 2 randomly selected), 33 shared a concordance in markers in the area of Xq28 (the tip of the long arm of the X-chromosome)⁶⁰. Statistically, the confidence level of this study is of over 99%, which means there's less than a 1% chance of it being a random coincidence. Hamer finally concluded that the Xq28 is a clear genetic cause of, or at least a really strong contribution to, sexual orientation in homosexual men.

⁵⁷ Hamer, supra at 322 (None of the subject's father or their son/s were homosexual)

⁵⁸ Hamer, supra at 322 (By maternal cousins, we mean narrowly those sons of maternal aunts, in order to maintain the maternal gene line).

⁵⁹ Hamer, supra At 323

⁶⁰ Hamer, supra At 324

B. A HISTORY OF PURPOSEFUL DISCRIMINATION

As the Connecticut Supreme Court well explained, “The bigotry and hatred that gay persons have faced are akin to, and, in certain respects, perhaps even more severe than, those confronted by some [other] groups that have been accorded heightened judicial protection.”⁶¹

Homosexuals as a group have been the targets of discrimination for hundreds of years, both by the private and public sectors. Society by itself has been cruel and unforgiving towards homosexuals, lead by widespread misconceptions and deceiving authority figures, but the argument in this particular section of suspect class analysis focuses on such discrimination abided by the government itself in its judicial, legislative, and executive branches.

Such discrimination is blatant and grossly unfair, and by the end of this section we expect to leave the reader without any possible doubt that history is riddled with countless examples of dubious discrimination merely on the basis of an individual’s sexual orientation. By no means this list is all-inclusive, but it should provide sufficient examples to appease any inquiring mind.

1. *Anti-Sodomy Laws*

Anti-sodomy laws were in effect in every state of the United States until 1961, imposing numerous punishments and penalties on any individual, either female or male, who engaged in sodomy (behavior most commonly known as anal and oral sexual intercourse). For example, the Georgia anti-sodomy law challenged in *Bowers v. Hardwick* stated as follows:

⁶¹ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 446 (Conn. 2008).

“(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organ of one person and the mouth or anus of another....
(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.”⁶²

Illinois was the first state to break the trend in 61’ by eliminating private consensual sodomy between two adults as a punishable offense⁶³. Before this, “the states between 1946 and 1961 imposed criminal punishments on as many as a one million lesbians and gay men engaged in consensual adult intercourse, dancing, kissing, or holding hands.”⁶⁴ Pennsylvania was the first to enact an anti-sodomy law in 1879⁶⁵ and by the 1920’s all other states had follow suit.

Even if not all anti-sodomy laws specifically targeted homosexuals, the repercussions were mostly felt by them. Anal and oral sex are the only or main forms of sexual behavior gay men and lesbians can participate in, thus banning such behavior affects gay men personally and most lesbians particularly, which in turn aims to target them.

These laws were challenged and upheld even as late as in 1993, most famously decided by the Supreme Court in *Bowers v. Hardwick*, where a man was caught having consensual homosexual relations with another man in his home. The Court claimed in *Bowers* that even if American citizens had an implicit right to privacy in the constitution, this right did not extend to protect homosexual sexual acts. Chief Justice Burger’s concurrent opinion declared, “There is no such thing as a fundamental right to commit homosexual sodomy” and to “hold that homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral

⁶² Ga. Code Ann. § 16-6-2 (1984)

⁶³ Lee Walzer, *Gay Rights On Trial: a Reference Handbook* (Santa Barbara, Calif.: ABC-CLIO, 2002), p. 68

⁶⁴ William N. Eskridge and Jr, *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, Mass.: Harvard University Press, 1999), p. 60

⁶⁵ Eskridge, *supra* At 24

teaching.”⁶⁶ Anti-sodomy laws were up to each individual state to impose or exclude from their state constitutions, until *Lawrence v. Texas* in 2003. The Supreme Court heard the case of John Geddes Lawrence, a man who was arrested for having anal sex with another consenting male, Tyron Garner, and charged for breaking Chapter 21, Section 21.06 of the Texas Penal Code (most commonly known as the “homosexual conduct law”) banning sodomy acts. The Court decided on a 6-3 ruling that *Bowers* was unconstitutional, and set precedent to ban any present or future anti-sodomy laws (which invalidated laws in the last 13 states with illegal sodomy). Justice Kennedy's majority opinion declared that there is a fundamental right for consenting adults to engage in private sexual activity, and he specified that this right is protected under the word "liberty" in the due process clause of the Fourteenth Amendment.

Justice Kennedy wrote: "The Court began its substantive discussion in *Bowers* as follows: 'The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.' That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."⁶⁷

The Court finally ruled in favor of homosexual's privacy, but this way incredibly late in history compared to similar cases. Interracial couples once were banned from sexual activity with one another⁶⁸, but in 1964, much earlier than *Lawrence*, the Court ruled them

⁶⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986)

⁶⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Kennedy delivering the court's opinion.

⁶⁸ Section 798.05 of Florida statutes read: "Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the

unconstitutional under the Fourteenth amendment⁶⁹. Moreover, anti-sodomy laws yielded many other legal reprimands for homosexuals. For example, gay solicitation was a crime in all states because it encouraged others to participate in a criminal act (sodomy), and thus was illegal⁷⁰. This is how most homosexuals were caught, since unveiling the occurrence of sodomy acts in someone's private home was rather difficult but catching him soliciting it in public wasn't⁷¹.

2. *Marriage Inequality*

The Hawaii Supreme Court decided in *Baehr v. Miike*⁷² (1993) that denying marriage licenses to same-sex couples under Hawaii's law HRS 572-1 constituted as a form of discrimination against the class and thus was unconstitutional⁷³. The Court claimed that denying a marriage license for Ninia Baehr and Genora Dancel was a form of sex-discrimination and did not carry a compelling state interest for it to pass the scrutiny threshold. "Further, even assuming arguendo that Defendant was able to demonstrate that the sex-based classification of HRS 572-1

nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

⁶⁹ *McLaughlin v. Florida* 379 U.S. 184 (1964)

⁷⁰ edited et al., *Homosexuality: Discrimination, Criminology, and the Law* (New York: Articles-Garlan, 1992), p. 404

⁷¹ *Supra* note 70, At 405 citing *Pryor v. Municipal Court*, 25 Cal. 3d 238, 252 n.8, 599 P.2d 636, 644 n.8, 158 Cal Report 330, 338 n.8 (1979)

⁷² Formerly *Baehr v. Lewin*

⁷³ See *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) Judge Chang stated the opinion of the court: "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT: 1. The sex-based classification in HRS 572-1, on its face and as applied, is unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution. 2. Defendant Lawrence H. Miike, as Director of Department of Health, State of Hawaii, and his agents, and any person in acting in concert with Defendant or claiming by or through him, is enjoined from denying an application for a marriage license solely because the applicants are of the same sex. 3. To the extent permitted by law, costs shall be imposed against Defendant and awarded in favor of Plaintiffs. "

is justified because it furthers a compelling state interest, Defendant has failed to establish that HRS 572-1 is narrowly tailored to avoid unnecessary abridgments of constitutional rights.”⁷⁴

After Hawaii’s Supreme Court decision, Congress adopted The Defense of Marriage Act as a response to a wave of state legislatures banning same-sex marriage. DOMA is the most controversial congressional law passed against homosexuals in the United States in the past 20 years. Congress enacted the Defense of Marriage Act (DOMA) in 1996, which bars federal recognition of same-sex marriages and allows states to follow suit legally. It denies 1,138 federal statutes involving marriage or spousehood to be extended to same-sex couples⁷⁵. Since 1996, many states have enacted legislation prohibiting same-sex marriages or the recognition of same-sex marriages formed in another jurisdiction. States have traditionally recognized marriages granted in other states, even such states which have laws that do not allow same-sex marriages to be solemnized.⁷⁶

The pursuit of marriage equality for same-sex couples brings much-needed focus to the everyday needs of lesbian and gay couples. Without full legal recognition and protections, same-sex couples confront a variety of complicated legal and financial issues.

Currently, the federal government does not respect the actual legal status of married same-sex couples and individuals who have been married to a same-sex spouse for any purpose, including federal income taxation and estate and gift tax considerations, regardless of whether their home states honor their unions. Same-sex married couples thus are required to file separate individual federal income tax returns, each with a filing status of "single," even when they must

⁷⁴ In *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) under Conclusion of Law by Judge Chang.

⁷⁵ Elizabeth Burleson, *From Nondiscrimination to Civil Marriage*, 19 *Cornell J. L. & Pub. Pol’y* 383 (2010). P. 391

⁷⁶ 16 *Quinnipiac Law Rev.* 192 (1996-1997) (“Accordingly, it enacted the so-called Defense of Marriage Act (DOMA), which permits states to refuse recognition to ‘any public act, record, or judicial proceeding of any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State...’”)

file their state returns with a "married" status. Because taxpayers can face legal liability if they knowingly file a tax return that is false or misleading and the federal tax return form presently offers no way for same-sex married couples to identify their legal status accurately, some worry that they could risk a penalty no matter how they prepare their federal return.

Moreover, there are countless of benefits and rights that homosexuals are being deprived of by this federal ban on same-sex marriages. As the Gay & Lesbian Advocates & Defenders (GLAD) so readily explain:

Federal law excludes legally married same-sex couples and their children from the biggest programs our government offers to support and protect families and denies them important federal rights and protections, including:

- ☐ The right to take time off from work to care for a seriously ill spouse through the Family Medical Leave Act; Access to all the benefits of a spouse's health plan, without a tax penalty;
- ☐ Medicaid preventions against elder homelessness when one spouse goes into a nursing home;
- ☐ Social Security spousal and survivor benefits related to disability, care of a minor child, retirement, and death, which protect a family's economic security in old age, and upon disability or death
- ☐ The right to leave assets to your spouse – including the home you share together – without incurring a tax penalty;
- ☐ Joint tax filing and pooled deductions that can save families money;
- ☐ Retirement and death benefits for spouses of federal employees;
- ☐ Disability, dependency or death benefits for the spouses of veterans and public safety officers;
- ☐ The ability to sponsor a non-resident spouse for purposes of immigration.⁷⁷

The language of DOMA is by itself discriminatory towards homosexuals. Title one describes marriage as between a man and a woman only for all federal purposes, which automatically excludes same-sex couples from engaging in the practice of marriage. There is no question that DOMA discriminates against homosexuals, and just as anti-sodomy laws it should

⁷⁷ "DOMA": Federal Discrimination Against Same-Sex Married Couples" flyer (See: www.glad.org/uploads/docs/publications/doma-flyer.pdf)

be unconstitutional. As *McLaughlin v. Florida* (1964) established the legality of interracial sexual relations, *Loving v. Virginia* (1967) followed by allowing interracial marriages. Why hasn't the court allowed same-sex marriages federally after *Lawrence v. Texas* as well? That's a question that remains unanswered. If anti-miscegenation laws are unconstitutional for discriminating against the class of race by prohibiting them the right of marriage, it should logically follow that homosexuals should not be discriminated as a class either with laws such as DOMA.

3. Immigration Policies

Immigration laws once targeted all foreign homosexuals and banned them from United States territory. Homosexuals were first banned from entering the United States in the Immigration Act of 1917, which synthesized all exclusions for entry into the country and added a new group of individuals who were banned: those suffering from “constitutional psychopathic inferiority”⁷⁸. This latter group referred to sexual degenerates, of which homosexuals were considered part. Those in charge of enforcing this law considered this group to contain individuals such as sexual perverts and other who “because of eccentric behavior, defective judgment, or abnormal impulses are in repeated conflict with social customs and constituted authorities”⁷⁹.

⁷⁸ Eskridge, *supra* note 64, at 35.

⁷⁹ Eskridge *supra* note 64, at 36, quoting the Public Health Service Manual of the Mental Examination of Aliens (1918), discussed in *In re Rochelle*, 11 I&N Dec. 436, 440 (Bd. Imm. App. 1965)

Under the “crimes of moral turpitude” exclusion, alien homosexuals could be deported for simply admitting to conducts such as sodomy, public lewdness, or gross indecency⁸⁰. In other words, if anyone admitted to being a homosexual, or even participating in homosexual sexual behavior, he or she would be deported or denied entry to the United States of America.

Physicians examined all aliens who gave indicia of homosexuality and those who were certified as “mentally defective” were denied admission to the states. Homosexuals were classified back then as psychopathic inferior or mental defectives by the Immigration and Naturalization Services (INS) and the Public Health Service (PHS)⁸¹. The aim of this clause was to prevent any mental defects that might corrupt the minds of other American citizens or have a possibility of being passed down through generations and multiply⁸². Laws that banned lesbian and gay immigrants were officially repealed in 1990, but homosexual immigrants are still burdened with plenty of obstacle when filing for a legal alien status. For example, current immigration policy only recognizes “direct family ties” if they are heterosexual, thus same sex partners are therefore denied such immigration privileges when one of them is a citizen and the other seeks naturalization.

This idea that homosexuals were mentally defective was common both socially and in the medical field back then. Discrimination does not get clearer than when a group of individuals is stigmatized and then banned from even sharing the same physical space with other human beings. The mere fact that it took until 1990 for the government to realize how immoral and cruel these laws were, and that it still holds on to certain prejudices, is simply appalling.

⁸⁰ Eskridge, *supra* note 64, at 35

⁸¹ *Supra* note 70, at 59

⁸² Eskridge, *supra* note 64, at 36, quoting the Senate Report No. 352, 64th Cong., 1st Sess. 4-5 (1916)

4. *Gays In The Military*

The U.S. military has had rules and laws against homosexual activity on duty for centuries. The ban on homosexual behavior was created *de jure*⁸³ in 1943 when military regulations first established guidelines for military psychiatrists and their analysis of homosexuals⁸⁴. The doctors were to select homosexuals as those individuals who “habitually or occasionally engaged in homosexual or other perverse sexual practices”, claiming they were “unsuitable for military service”⁸⁵. This officially created the ban of homosexuals from ever participating as part of the armed forces of the United States⁸⁶.

The military has almost always dealt with complaints and law suits internally, and their homosexual ban was no different. The practice was not challenged until 1993, when President Bill Clinton sought to change the prosecution of homosexuals in the military and steer the regulations towards a ban on homosexual behavior rather than homosexual status of an individual⁸⁷.

The President and Congress together passed the law most commonly known as “Don’t Ask, Don’t Tell” (DADT), which was announced on July 19, 1993. The policy then set in place prohibited military officials from questioning or investigating the sexual preference of a military applicant without any previous compelling evidence for suspicion. The military still held the

⁸³ Before this, the ban existed *de facto*. There have been cases against homosexuals in the military which led to their discharge as early as in 1778. See, 28 U.S.F. L. Rev. 920 1993-1994

⁸⁴ *Id.* Note 83

⁸⁵ *Id.* Note 83 quoting “Randy Shilts, *conduct unbecoming: lesbians and gays in the U.S. military, Vietnam to the Persian Gulf* 11 (1993).”

⁸⁶ Or at least any individual who took part in homosexual behavior often, which is only part of homosexual identity as defined by modern culture.

⁸⁷ *Id.* Note 83 at 921

right to discharge members who “engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts.”⁸⁸

In 2010, Congress passed the Don’t Ask Don’t Tell Repeal Act of 2010⁸⁹, which invalidated DADT and discontinued its implementation effective September 20th, 2011. The act did not invalidate Don’t Ask Don’t Tell on the basis it discriminated against homosexuals, but instead simply called for its elimination seeking to “assure appropriate ways to monitor the workforce climate and military effectiveness that support successful follow-through on implementation.”⁹⁰ This not only leaves an opportunity open for future military bans on homosexual behavior, but it undermines the motives behind changing the legislation in the first place, most importantly seeking equality for all American citizens and stop discrimination on the basis of sexual orientation.

5. Employment And Housing Discrimination

Employment and housing are two factors that affect an individual the most. How one makes an income to subsist or support one’s family is a crucial aspect of an individual’s life. Where one lives, raises one’s children, or even gets to call a “home”, is just as important. When there is no uniform federal law that prevents employers and landlords from discriminating against sexual orientation, intricate aspects of a person’s lives are at risk and thus it generates a cycle of unfair treatment towards the class.

⁸⁸ Id. Note 83 at 925 citing National Defense Authorization Act for FY '94, Pub. L. No. 103-160, § 571 (1993), § 571 (b)(1).

⁸⁹ See H.R. 2965, S. 4023

⁹⁰ Id.

5.1. *Employment*

In 1884, *Payne v. Western Alt. R. R.* set precedent for the doctrine of “employment at will”. This allowed private and public employers to fire any employees for any basis without being subject to providing justification⁹¹. Some improvement has been taken in this area, including laws that protect gender bias, but nothing has been done at a large scale to protect homosexuals and their partners. There are currently no federal laws that protect homosexuals from being discriminated against in the private employment sphere. Unless a state or municipal law prevents it, employers can fire or refuse to hire individuals merely on the basis of their sexual orientation.

Although some states have passed anti-discrimination laws, these are not necessarily effective. In California, for example, The Department of Labor Standards Enforcement (DLSE) received 372 cases claiming discrimination on the basis of sexual orientation in 1996⁹². Out of all these cases, 40% were dismissed, 27% were abandoned, 24% were withdrawn, and 9% were settled in favor of the complainant⁹³. The state did not investigate why 91% of their cases did not reach a successful resolution, but the outcome isn’t so surprising when the state employs *one* individual alone to handle every single case of labor law complaints throughout the entire state⁹⁴.

In Schools, a governmental employer, cases have been no different. Different Boards of Education also feared that teacher’s homosexuality would corrupt the youth and thus had the ability to fire them. In *Ancofara v. Board of Education* (1974), the Court ruled that the Board of Education of Montgomery County had the right to fire a teacher simply because he was a

⁹¹ Chuck Stewart, *Gay and Lesbian Issues: a Reference Handbook* (Santa Barbara, Calif.: ABC-CLIO, 2003), p. 45-6

⁹² *Supra* note 91, at 39

⁹³ *Supra* note 91, at 39

⁹⁴ *Supra* note 91, at 39

homosexual and had tried to conceal it⁹⁵. Claiming, “his intentional withholding of facts about his affiliation with the Homophiles is inextricably linked to his attack on the constitutionality of the school system's refusal to employ homosexuals as teachers.⁹⁶” In *Gaylord v. Tacoma School District n. 10* (1977), the Court also set precedent denying Mr. Gaylord’s job back after being fired for being a homosexual on the basis that his sexual orientation was implicitly immoral and obtrusive to his efficient teaching on morality⁹⁷.

5.2. *Housing*

Just as the issue of employment, there is no federal law that protects homosexuals from being discriminated against on the aspect of housing. Individuals can be denied housing (either for rent or buy) on the basis of their sexual orientation. Some cities have laws that protect homosexuals from this kind of discrimination, but they’re not as widespread as they should.

For example, in 2000 the Ninth U.S. Circuit Court of Appeals ruled in *Thomas v. Anchorage* that a landlord had the right to deny housing to an individual on the basis of their sexual orientation⁹⁸. The court concluded that laws preventing them to do so would unconstitutionally get in the way between a person’s religion and their business⁹⁹.

⁹⁵ Supra note 91, at 192

⁹⁶ *Ancanfora v. Board of education* (1974) 491 F.2d 498

⁹⁷ Supra note 91, at 193

⁹⁸ Supra note 91, at 48

⁹⁹ Supra note 91, at 48

C. INCORRECT STEREOTYPES

Stereotypes are created to categorize a group of people under a single, often narrow-minded conception of traits, looks, and behaviors. As human beings, we categorize objects and actions in all aspects of life as a form of time management and life organization. But when we apply these categories to human being, it often results in stereotypes¹⁰⁰. Stereotypes occur when we group individuals into one category based on common traits, then add additional traits into that category (often after observing a single member with those additional traits, but sometimes simply on the basis of prejudice or stipulation), and lastly, inferring that all members of such category thus exhibit the newly added traits. These inferences are often unfounded and too broad to be applied to each member despite their personal characteristics.

Homosexuals have been subjected to incorrect stereotypes for hundreds of years, and it wasn't until recent social movements and medical discoveries that these stereotypes began falling apart. The subjection of homosexuals to mistaken stereotypes is closely related to the previous section, a history of discrimination. Legal actions that discriminated against homosexuals gave rise to incorrect stereotypes, and vice versa, stereotypes fueled political arguments into implementing anti-homosexual laws.

This section will try to briefly explain some of the common misconceptions about homosexuals in the United States in the recent past, and how they justified different policies and laws discriminating against gays and lesbians. Needless to say, the following stereotypes are absolutely unfounded and inaccurate. Most of them have been turned around or ceased to have

¹⁰⁰ Herek, Gregory M., "Stigma, Prejudice, and Violence Against Lesbians and gay Men." In Eds. (1991) *Homosexuality: Research Implications for public policy*. Page 65.

widespread belief, but there are still plenty of homosexual stereotypes that remain alive within our society.

1. *Homosexuals And The American Children*

1.1 *Gays Will Turn Your Kids Gay*

There is no more ridiculous stereotype as that of homosexuals' ability to "turn" children gay. There was once, and still somewhat is, a societal view that homosexuals can and will actually make children gay if they come in contact with them. This stereotype was powered by either the belief that homosexuals seek to "recruit" children or that their lives were so enticing that children would embrace it as normal¹⁰¹.

This was mostly prominent in the case of homosexual teachers. Parents were concerned that if their kids spent too much time with a homosexual, that they would grow up to be homosexuals as well¹⁰². In *Safransky v. State Personnel Bd.* (1974), the state court claimed that a teacher's homosexuality impeded him from teaching the "orthodox" sexual behaviors (heterosexual) to his students when teaching about human sexuality¹⁰³. This was because being gay made him approve of homosexual behavior and thus stood in the way of teaching homosexuality as "unorthodox". Moreover, kids were impressionable, and his sexual orientation might make them believe homosexuality was acceptable. The Court wrote:

¹⁰¹ Supra note 5, at 821

¹⁰² Supra Note 5

¹⁰³ *Safransky v. The State Personnel Board*, 62 Wi., 2nd ser., p. 464 (1974)

“His discussions concerning his homosexual associations and activities in the presence of residents constituted an adverse influence to the proper performance of his position duties--namely, the projection of the orthodoxy of male heterosexuality. We are satisfied that such findings are supported by substantial evidence. The deleterious effect on proper job performance is obvious. An individual fulfilling the position of houseparent cannot discuss homosexuality in the presence of his wards without at least communicating an idea of tacit approval of such action. The patients are all too vulnerable to accept as orthodox those ideas propounded by their houseparent.”¹⁰⁴

Thus, the concept expressed that homosexuals can turn your children gay by simply being gay, which would show them it’s also appropriate to be gay. The case of *Gaylord v. Tacoma School District n. 10* (1977) explained in the section above also showed that the Supreme Court held a stereotype that homosexuals were immoral and thus couldn’t possible teach efficiently, based on the definitions of homosexuality in encyclopedias like the *New Catholic Encyclopedia*¹⁰⁵.

1.2 *Homosexuals As Child Molesters And Sexual Psychopaths*

This stereotype was often used to justify sodomy laws. The Miller Act of 1948 was the first response to a wave of concerns about child molestation¹⁰⁶. The law reflected the views about homosexuality and sodomy, and took an emphasis on children, giving a high maximum penalty of 20 years to any individual caught sodomizing a minor¹⁰⁷. The aim of these laws was to prevent homosexuals from turning into pedophilia, which was an apparently strong and viable threat.

¹⁰⁴ Id.

¹⁰⁵ Supra note 91, at 193

¹⁰⁶ Supra note 64, at 60

¹⁰⁷ Supra note 64, at 60

Socially, these beliefs were growing in intensity by the minute. Back in 1977, Anita Bryant successfully repealed a Dade County (FL) ordinance prohibiting anti-gay discrimination. During the process, she named her organization "Save Our Children," and claimed "a particularly deviant-minded [gay] teacher could sexually molest children."¹⁰⁸ Even as late as in 2002, the Family Research Council managed to manipulate research and issue a false report claiming homosexuals account for one third of all child abuse cases¹⁰⁹. Truth is, homosexuals are not prone to pedophilia, and no more prone than any heterosexual would be¹¹⁰.

Cases involving sodomy, discrimination in the workforce, and even anti-homosexual immigration laws, all derived from the popular belief that homosexuals were sexual psychopaths, and more importantly, mentally ill. We already stated that before 1973 homosexuality was defined by the American Psychological Association as a mental illness or disease.¹¹¹ This claim done by such a powerful medical authority gave rise to sufficient justification for countless of legal and social discriminatory policies and behaviors¹¹².

Nowadays, these claims have been overridden. The American Psychiatric Association, American Psychological Association, National Association for Mental Health, and the Surgeon General now all agree that homosexuality is not a mental illness¹¹³. Homosexuality involves the physical, mental, and emotional attraction to someone of the same-sex, and never been and never will be a deficiency in someone's mental capacity or character. All sexual orientations are

¹⁰⁸ Bryant, A. (1977). *The Anita Bryant story: The survival of our nation's families and the threat of militant homosexuality*. Old Tappan, NJ: Fleming H. Revell.

¹⁰⁹ Supra note 91, at 41. Even scholars cited in the report claimed that their research had been manipulated and asked not to be associated with the publication at all.

¹¹⁰ Supra note 5, at 823

¹¹¹ Supra note 1

¹¹² See above cases on employment discrimination for immoral behavior (*Gaylord v. Tacoma*), immigration bans on homosexuals for being mentally defective ("Homosexuals were classified back then as psychopathic inferior or mental defectives by the Immigration and Naturalization Services (INS) and the Public Health Service (PHS)"), and sodomy laws.

¹¹³ Supra note 5, at 824

respected as healthy and immutable by the APA, who has stated that “for nearly three decades, it has been known that homosexuality is not a mental illness. Medical and mental health professionals also now know that sexual orientation is not a choice and cannot be altered.”¹¹⁴

2. *Gender-Roles And Homosexuality*

Gender roles have existed for as long as history has been recorded. In America, the heterosexist paternalistic society has claimed for centuries that women and men should fit a certain criteria of traits and behaviors to be considered adequate within their gender. These too are stereotypes, but for heterosexuals. Men are stereotypically strong and powerful and women are docile and submissive. The problem arises when you encounter males who are attracted to other males, and females who are attracted to other females. Society then misconstrues homosexuality for gender-bending. It automatically assumes that being attracted to the same-gender means one desires *to be* the opposite gender because the opposite gender is the one attracted to their gender in a hetero-normative society. Thus arise all the stereotypes about homosexuals and their gender-queerness.

Gay men have often been seen as a weak link. They stereotypically present characteristics such as effeminate looks and mannerisms, weak figures, overly emotional reactions, heightened sexual drive, and impulsive behaviors among many others. Lesbians, on the other hand, are viewed as manly, man-haters, rude, crass, liberal, forceful, and unattractive¹¹⁵. A group of

¹¹⁴ Supra note 91, at 58, quoting the APA’s “Health Care Needs” of 1994.

¹¹⁵ “Attractive” being the hetero-normative definition of a feminine and educated housewife. Lesbians are viewed as manly, thus not “attractive” under the conception of a heterosexual dominated view of attraction.

researchers lead by Allan Gross in 1980 interviewed college students and found that they “believed gay men generally to be theatrical, gentle, and liberated, whereas heterosexual men were thought to be more aggressive, dominant, competitive, strong, and stable; the same students believed lesbians generally to be dominant, direct, forceful, strong, liberated, and nonconforming, whereas heterosexual women were perceived as more likely to be conservative and stable.”¹¹⁶

These stereotypes have kept men and women from education, work, military service, and other crucial aspects of life. Society as a whole has held countless of erroneous views on homosexuality, generalizing stereotypes instead of viewing each individual by their own personal characteristics and with their own set of personal behaviors and choices.

D. POLITICAL REPRESENTATION OF HOMOSEXUALS

What if you belonged to a group but had no way to tell who else was in it? What if your needs and interests as a member of such group were ignored, and society still wouldn’t care? What if the one quality that defined your inner core beliefs was the same quality politicians you trust were trying to hide or oppress? Being a homosexual does not change your citizenship status. As a gay American, one should be entitled to the same rights and considerations any other American does. And regardless of what society says at any given point in history, truth and justice seem to emerge for the underrepresented, which is what we’re hoping today for sexual orientation.

¹¹⁶ Supra note 100, at 65. Citing Gross, A.E., Green, S.K., Storck, J.T., & Vanyur, J.M. (1980) “Disclosure of sexual orientation and impressions of male and female homosexuals”, *Personality and social Psychology Bulletin*, 6, 307-314

1. Homosexuality In Congress

The proportional representation of homosexuals in Congress is extremely difficult to research and analyze, since the characteristic of sexual orientation is not by any means something that can be observed or “picked out” from an individual as an obvious fact, and thus how “proportional” their representation is varies according to how we interpret representation in the first place. Representation for this section will be analyzed by the quantity of homosexual representatives in Congress, the amount of homo-friendly Congressmen regardless of their personal sexual orientation, and lastly, the quantity and quality of legislation that Congress passes favoring and furthering the rights of homosexuals.

Sexual orientation cannot be measured or accounted for accurately since not everyone is open about his or her own sexual orientation. Countless men and women carry on with a lifetime of hidden identities, never admitting to the world and/or themselves their own sexual orientation, so how are we to ever know the truth if they don’t even know it for themselves? Moreover, the social stigma that accompanies sexual orientation does not make matter easier: if you will be socially prosecuted for “coming out”, then chances are you will stay “in the closet”. It is crucial to present this disclaimer in order to bring attention to the varying validity and availability of statistics.

These statistics, both for the population at large and congress themselves, need to be taken into consideration with the knowledge that many, many individuals are not disclosing their true sexual orientation for fear, religion, culture, etc. The Williams Institute at the UCLA School of Law, estimates that: 9 million (about 3.8%) of Americans identify as gay, lesbian, bisexual or transgender (2011). The institute also found that bisexuals make up 1.8% of the population,

while 1.7% are gay or lesbian. Transgender adults make up 0.3% of the population¹¹⁷. If roughly 4% of the population openly identifies as anything but heterosexual, we can make a confident inference that the actual number would be higher if social stigmas and prejudices were not threatening those responding the survey.

This is particularly true for representatives in Congress. Here we have a group of men and women, highly educated and under a great amount of public pressure, who are looking to please the largest amount of constituents in order to be reelected. Chances are, the less controversy one raises about their own sexual orientation while in congress, the greater the opportunity to be reelected.

There have been six openly LGB members in the history of Congress. Gerry Studds (elected in 1972) became the first openly gay man when he publicly announced his sexuality in 1982. Barney Frank (serving since 1981) first spoke publicly about his sexual orientation in 1987. Steve Gunderson (elected in 1980 and outed in 1994) and Jim Kolbe (elected in 1984 and outed in 1996) are two other previous members of Congress who were openly gay. Republican representative Mark Foley's homosexuality was well-known in his district, though he did not serve openly in Congress and did not come out publicly until after his term ended. Current congresswoman Tammy Baldwin is the first and so far only open lesbian woman to win election

¹¹⁷ "Drawing on information from four recent national and two state-level population-based surveys, the analyses suggest that there are more than 8 million adults in the US who are lesbian, gay, or bisexual, comprising 3.5% of the adult population. There are also nearly 700,000 transgender individuals in the US. In total, the study suggests that approximately 9 million Americans – roughly the population of New Jersey – identify as LGBT. Key findings from the study include among adults who identify as lesbian, gay, or bisexual, bisexuals comprise a slight majority (1.8% compared to 1.7% who identify as lesbian or gay); women are substantially more likely than men to identify as bisexual; estimates of those who report any lifetime same-sex sexual behavior and any same-sex sexual attraction are substantially higher than estimates of those who identify as lesbian, gay, or bisexual. An estimated 19 million Americans (8.2%) report that they have engaged in same-sex sexual behavior and nearly 25.6 million Americans (11%) acknowledge at least some same-sex sexual attraction." (Gary J. Gates, Williams Distinguished Scholar, taken from UCLA Williams Institute website)

to Congress. In 1998, she became the first ever openly gay person to win election to Congress as a non-incumbent. Former California representative Michael Huffington is bisexual, but did not come out until after his term had ended. Jared Polis (who was elected in 2008 and assumed office on January 6, 2009) is the first openly gay man to have been elected to the House as a freshman.

This means that about 1.4% of Congress is openly of another orientation besides heterosexual, whereas 3.8% of the population at large is. Both numbers are smaller than they should be, clearly, but it still raises the question of whether the interests of a group so fundamental to an individual's persona are being prioritized by representatives in Congress. With so many anti-homosexual laws like DOMA, are we honestly to believe that the body of politicians is accurately representing the non-heterosexual constituency?

Sexual orientation as a group has a wide range of political interests that society, or representatives in particular, should try to cater to. As Virginia Sapiro¹¹⁸ explains that women should be entitled to a representation based on their gender, not only as individuals, because of their encompassing specific interests as women. In the same manner, homosexuals are a strong group of constituents with specific interests. Gays, lesbians, bisexuals and transgender individuals have the exact same needs and political interests as any heterosexual individual would: they want the same rights as everyone else, they want to not be restricted or discriminated against on the basis of a personal trait, they want equality and fairness, they demand due process, the right to marry, to adopt, to live a happy and full life as any other American citizen.

¹¹⁸ Sapiro, Virginia. 1981. "Research Frontier Essay: When Are Interests Interesting? The Problem of Political Representation of Women." *American Political Science Review*. 75(3):701-16.

2. Homosexuals And Lobbying

Some claims have been made that homosexuals do not constitute a powerless and insular minority¹¹⁹. These people claim that as history evolved, nowadays homosexuals have sufficient political power as a group to make changes through the legislative branch of government, either by political organizations, lobbyists, or social movements. It is worthy to point out the various advancements the legal and governmental system has had on sexual orientation discrimination.

We are slowly seeing progress, most increasingly in the last few years of the Obama administration. President Obama set great focus on the rights of homosexuals and transgendered individuals, and accomplished some fantastic policies: such as the repeal of DADT and the HHS hospital rights for same-sex couples. The Department of Health and Human Services (HHS), for example, was swayed by the president to implement rules that protect hospital patients' right to choose their own visitors during a hospital stay, including a visitor who is a same-sex domestic partner. These rules now apply to all hospitals that participate in Medicare and Medicaid. The guidance also supports the right of patients to designate the person of their choice, including a same-sex partner, to make medical decisions on their behalf should they become incapacitated¹²⁰.

But even noting the great advancements in gay rights, we still need to compare this to other suspect groups and their political powerlessness, given that as society changes so does the reach of each minority in policy decisions. African-Americans, for example, are a clearly more powerful minority than homosexuals are, but it would be irrational to claim they do not deserve

¹¹⁹ Supra note 32, at 956

¹²⁰ HHS News Release on <http://www.hhs.gov/news/press/2010pres/11/20101117a.html>

the special protection from the court under strict scrutiny anymore mere because their political reach has increased since the Civil Rights Movement¹²¹.

Moreover, while it is absolutely true that gay rights have seen much improvement from their abhorrent beginnings, this does not mean that homosexuals as a group are powerful enough to avoid discriminatory policies through legislative channels. Federal laws override state laws, so in practicality, not only could congress pass countless laws to protect this minority group, but they could also strike down existing ones.

Laws could be passed to prevent future discrimination against sexual orientation. Anti-bullying laws need to be passed to prevent the enormous rate of suicides. The Suicide Prevention Resource Center synthesized these studies and estimated that between 30 and 40% of LGB youth, depending on age and sex groups, have attempted suicide. The *Report of the Secretary's Task Force on Youth Suicide* (1989) found that homosexual kids were four times more prone to commit suicide than were other non-homosexual kids¹²². This is apparently due to higher levels of stress in homosexual kids being stigmatized by their heterosexual peers. "More than 34,000 people die by suicide each year," making it "the third leading cause of death among 15 to 24 year olds with lesbian, gay, and bisexual youth attempting suicide up to four times more than their heterosexual peers"¹²³.

Anti-discrimination laws in the workforce could be implemented at a national level, although many cities and states already have them in place. While the Supreme Court has failed to set a consistent national policy regarding sexual orientation discrimination, many states and

¹²¹ Supra note 32, at 956

¹²² Alcohol, Drug Abuse, and Mental Health Administration, "Report of the Secretary's Task Force on Youth Suicide", Volume 1: Overview and Recommendations. DHHS Pub. No. (ADM)89-1621. Washington D.C.: Supt. Of Docs., U.S. Govt. Print. Off., 1989

¹²³ "Additional Facts about Lesbian, Gay, Bisexual, and Transgender Youth". Thetrevorproject.org. <http://www.thetrevorproject.org/suicide-resources/suicidal-signs>.

municipalities have taken the lead in passing protections for homosexuals in areas such as employment and public accommodations. The first of these were passed in the early 1970s, subsequently hundreds of municipalities and many states have adopted anti-sexual orientation protections. Probably the most famous anti-discrimination sexual orientation law was Vermont's Civil Union Law, passed in the year 2000, which permits same-sex couples to enter into "civil union" relationships. The law, while not using the language of marriage, gives same-sex couples virtually all of the 300 or so state rights available to married couples. No other state gives same-sex couples this sort of protection, but several other states currently have anti-discrimination laws and protection for homosexuals. For example, New Jersey, Minnesota, and Connecticut all have protections against discrimination in employment, public accommodation, housing, and credit.

Policy changes would be vast and potentially life changing for many Americans. If representation for sexual orientation would grow to a considerably tangible amount, we would be able to see more liberal approaches to policies such as marriage, taxes, anti-discrimination laws, etc.

V. STARE DECISIS

“Latin for ‘to stand by things decided’. Stare decisis is essentially the doctrine of precedent. Courts cite to stare decisis when an issue has been previously brought to the court and a ruling already issued. Generally, courts will adhere to the previous ruling.”¹²⁴

This section proposes a legal analysis of previous court case decisions on gender as a suspect class and their rulings. The idea is to make a just comparison between the plight of gender and its goal to become a suspect class, and how the decisions of the court could easily be applied to that of homosexuals.

1. *Reed v. Reed, Frontiero v. Richardson, Craig v. Boren, Romer v. Evans, and U.S. v. Virginia*

In *Reed v. Reed* in 1971, the Court said that a “Classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstances shall be treated alike.”¹²⁵ State laws that discriminate on the basis of sexual orientation classify homosexuals as a group with fewer rights than heterosexuals are afforded and promulgate the view of homosexuality as immoral only on basis of social views. This goes against the right of gays and lesbians to be treated as equals with other individuals in their similar qualification circumstances.

¹²⁴ Definition from the Cornell Legal Information Institute
http://www.law.cornell.edu/wex/stare_decisis

¹²⁵ *Supra* note 13, at 664

In *Frontiero v. Richardson* (1973) the Court, discussing gender under strict scrutiny, stated that “What differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”¹²⁶ Within that definition, sexual orientation should be considered a suspect group targeted for discrimination and protected under high scrutiny such as race or national origin, since it too has no effect on a person’s ability to contribute to society. Furthermore, Mr. Justice Brennan in *Frontiero* said, “By ignoring the individual qualifications of particular applications, the challenged statute provided dissimilar treatment for men and women who are similarly situated.”¹²⁷ All anti-homosexual legislation generalizes the homosexual population as immoral, unfit, undeserving, or inferior. In this particular case, the court showed their opposition to the practice of legally generalizing a social opinion, stating that “Statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”¹²⁸

Needless to say, the Court has been against stereotypes within the law in countless of cases. In *Reed*, the court said that “laws containing overbroad, sex-based assumptions violate the equal protection clause”¹²⁹, which they reiterated in *Frontiero*. In *Craig v. Boren*, the Court stated that “archaic and overbroad generalizations could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas were rejected as loose-fitting characterizations incapable of supporting state statutory schemes

¹²⁶ Supra note 13, at 667

¹²⁷ Supra note 13, at 667

¹²⁸ Supra note 13, at 667

¹²⁹ Supra note 13, at 665

that were premised upon their accuracy”¹³⁰. Misconception and stereotypes about homosexuals' morals/ethics and their capacities or abilities is by no means enough to create a legal policy against them, the same way it wasn't enough to stop women from working.

Within the discrimination spectrum, the Supreme Court declared in Craig that, “Classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.”¹³¹ Anti-homosexual laws and policies lack an important governmental objective because the exclusion or discrimination against homosexuals has yet to be proven to be beneficial for any aspect of society. The Court, in *U.S. v. Virginia* (1996), said that “our precedent instructs that “benign” justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.”¹³²

In the sexual orientation case of *Romer v. Evans* in 1996, the Court stated that publicly approved Amendment 2 in Colorado (which banned homosexuals from seeking refuge against discrimination in any level of the state) “Has the peculiar property of imposing a broad and undifferentiated disability on a single named group, and [...] it lacks the rational relationship to legitimate state interest”¹³³, and that “the amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies”¹³⁴, which deemed it unconstitutional. Moreover “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense... [L]aws of the kind now before us raise the inevitable inference that the disadvantage

¹³⁰ Supra note 13, at 671

¹³¹ Supra note 13, at 670

¹³² Supra note 13, at 678

¹³³ Supra note 13, at 689

¹³⁴ Supra note 13, at 689

imposed is born of animosity towards the class of persons affected. [...] It inflicts on the immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”¹³⁵ The Supreme Court made that statement with their opinion in Romer, and it is a clear-cut opposition to policies like DOMA.

Some even claim that allowing homosexuals to be a suspect class would generate too much frenzy. That the Supreme Court would have to invalidate countless laws and its repercussions would be too far-reaching and revolutionary to feasibly manage. But this excuse is, as the Supreme Court mandated in Reed v. Reed, unconstitutional, “To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. [...] Administrative convenience is no justification for violating the Constitution.”¹³⁶

VI. CONCLUSION

The Supreme Court set forth the qualifications a group of individuals should entail in order to be considered a suspect class and thus granted special protection under the 14th amendment. These are a history of purposeful discrimination, immutability of traits, incorrect stereotypes, and political powerlessness. As presented in the sections above, there should be no possible doubt in the reader’s mind that homosexuality as a group of citizens fulfills all the criteria the Courts have set forth. Homosexuality, moreover, fulfills the indicia just as deeply and

¹³⁵ Supra note 13, at 690

¹³⁶ Supra note 13, at 664-65

widely as any other suspect class recognized by the courts has before. Even if some of the qualifications are not satisfactory to the reader, for whatever reason or prejudice, it should be out of question from an objective standpoint that in the least homosexuality should be deserving of quasi-suspect status and protected under heightened scrutiny. The Court, as it stands, shows a bias against homosexuals by not considering their case as worthy of the same statutory review as do other groups. It is the aim of this essay to broaden the views of the reader and reach out to the community as a whole to educate all citizens of the reality of this injustice.

1. Commentary Of Personal Opinion

People hold pillars of rational, ethical and moral fundamentals deep in the core of their personality. And just as much as someone would find it disturbing to their core values to allow gay marriage or gay adoptions, it would just as much harm the fundamental values and core sense of identity of a homosexual not to be able to marry the person they love or raise their children together as legal guardians. I don't believe there are negative aspects of allowing higher sexual orientation representation and pursuing laws that would benefit them, but I respect others who believe there would be. In my opinion, gay-friendly policies would simply improve society. We are endowed to our fellow countrymen to pursue equal opportunities and achieve the ability of happiness for all Americans alike. We hold in our hands the ability to grant a human being a right that would change their lives, a right that could hand them equality and the opportunity to love, leading to better human beings and a greater sense of human charity. Regardless of your religion or political affiliation, as human being we are inherently wired to help one another in

order to become better individuals. If the negative aspects are minimal, and the positive are abysmal, then there's no excuse not to allow someone the right to be comfortable with their identity both internally to themselves and externally with the world.

Forty years ago, interracial marriage was illegal in most states in our country. Anti-miscegenation statues prohibit those of different races from professing their love to one another and marry one another. What now would appall most educated citizens on the United States (not allowing individuals to marry just because of their race) was once completely acceptable. It wasn't until Loving v. Virginia in 1967 that the Supreme Court ended all race-based legal restrictions on marriage. Does this mean we blame all interracial couples who tried to marry before such law was passed? Were they immoral human beings for wanting to share their love with one another? Would it change your mind to know our president was born from an interracial marriage? How about if you were aware that such marriage was in fact before Loving v. Virginia, when most states agreed that such union was in fact immoral and illegal? We've come long ways from discrimination on the basis of race, even on the basis of gender, then why can't we grow as a nation and stop this unfair treatment of homosexuals? What was once considered a horrific sin is now viewed as a common behavior to express two free individual's love. Let's be proactive and think ahead, otherwise, we will most certainly look back on our ignorance with regret in the future when gays are thought of the same way.

BIBLIOGRAPHY

Alcohol, Drug Abuse, and Mental Health Administration, "Report of the Secretary's Task Force on Youth Suicide", Volume 1: Overview and Recommendations. DHHS Pub. No. (ADM) 89-1621. Washington D.C.: Supt. Of Docs., U.S. Govt. Print. Off., 1989

Bice, Scott H., "Rationality Analysis in Constitutional Law", *Minnesota Law Review*, Volume 65, Issue 1 (1980)

Bryant, A. "The Anita Bryant story: The survival of our nation's families and the threat of militant homosexuality". Old Tappan, NJ: Fleming H. Revell, 1977

Burleson, Elizabeth, "From Nondiscrimination to Civil Marriage" *Cornell J. L. & Pub. Pol'y* Volume 19, 383 (2010)

Byne, William, "Science and Belief: Psychobiological Research on Sexual Orientation" *Journal of Homosexuality*, Volume 28, Issue 3-4

Byrd, Dean A.; Olsen, Stony, "Homosexuality: Innate and Immutable?" *Regent University Law Review*, Volume 14, p.383 (2001-2002)

Conger, John J., "Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives." *American Psychologist*, Vol. 30(6), Jun 1975

Dean H. Hamer, et al., "A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation" *Science*, New Series, Vol. 261, No. 5119 (Jul. 16, 1993)

Dynes, Wayne R.. "Homosexuality: discrimination, criminology, and the law". New York: Garland Pub, 1992

Ely, John. "Democracy and Distrust: A Theory of Judicial Review" (*Harvard Paperbacks*). London: Harvard University Press, 1980.

Epstein, Lee. "Constitutional Law For a Changing America" 6th ed. Washington, D.C.: CQ Press, 2007.

Eskridge, William. "Gaylaw : challenging the apartheid of the closet". Cambridge, Mass. London: Harvard University Press, 1999

Gates, Gary J., "How many people are Lesbian, Gay, Bisexual and Transgender?" Retrieved April 15th 2012, from: <<http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/how-many-people-are-lesbian-gay-bisexual-and-transgender/>>

GLAD. "DOMA: Federal Discrimination Against Same-Sex Married Couples" Retrieved April 15th 2012, from: <www.glad.org/uploads/docs/publications/doma-flyer.pdf>

Herek, G.M. "Stigma, prejudice, and violence against lesbians and gay men". In J. Gonsiorek & J. Weinrich (Eds.), *Homosexuality: Research implications for public policy* (pp. 60-80). Newbury Park, CA: Sage, 1991

HHS News Release, Retrieved April 15th 2012, from: <<http://www.hhs.gov/news/press/2010pres/11/20101117a.html>>

Intermediate Scrutiny Classification definition: Cornell University Legal Information Institute. Retrieved April 15th 2012, from: <http://www.law.cornell.edu/wex/intermediate_scrutiny>

Janine A. Parry , "Women's policy agencies, the women's movement and representation in the USA" in Joni Lovenduski, ed., *State Feminism and Political Representation*, New York: Cambridge University Press, 2006.

LeVay, "A Difference in Hypothalamic Structure between Heterosexual and Homosexual men", *Science*, New Series, Vol. 253, No. 5023 (Aug. 30, 1991)

Miller, Harris M. II, "An argument for the application of equal protection heightened scrutiny to classifications based on homosexuality." *Southern California Law Review*, Volume 57, p.797 (1983-1984)

Mondimore , Francis Mark, “*A Natural History of Homosexuality*”, Baltimore: The Johns Hopkins University Press, 1996.

Sapiro, Virginia. “Research Frontier Essay: When Are Interests Interesting? The Problem of Political Representation of Women”, *American Political Science Review*. 75(3): 701-16. (1981)

Sexual Orientation definition from Dictionary.com. *The American Heritage® Stedman's Medical Dictionary*. Houghton Mifflin Company. Retrieved April 15th 2012, from: <[http://dictionary.reference.com/browse/sexual orientation](http://dictionary.reference.com/browse/sexual%20orientation)>

Stare Decisis definition from the Cornell Legal Information Institute. Retrieved April 15th 2012, from: <http://www.law.cornell.edu/wex/stare_decisis>

Stewart, Chuck. “*Gay and Lesbian Issues: a Reference Handbook*”, Santa Barbara, Calif.: ABC-CLIO, 2003

Strasser, Mark, “Suspect Classes And Suspect Classifications: On Discriminating, Unwittingly Or Otherwise”, *Temple Law Review*, Volume 64, p.947 (1991)

Thetrevorproject.org, "Additional Facts about Lesbian, Gay, Bisexual, and Transgender Youth", Retrieved April 15th 2012, from: <<http://www.thetrevorproject.org/suicide-resources/suicidal-signs>>

Tribe, Laurence H., “*American Constitutional Law*”, 3rd ed. New York, N.Y.: Foundation Press, 2000.

Walzer, Lee. “*Gay rights on trial: a reference handbook*”. Santa Barbara, Calif: ABC-CLIO, 2002

Williams, Kenneth, “Gays in the Military: The Legal Issue”, *U.S.F. Law Review*, Volume 28, 1993-1994

Wolfson, Evan; Melcher, Michael F., ”Constitutional and Legal Defects in the Defense of Marriage Act” *Quinnipiac Law Review*, Volume 16, Issue 1-2